Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OZELLA SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit's decision was in error in holding that Petitioner Scott was not entitled to a jury trial on the question of whether her actions were reasonable under the particular circumstances concerning the consent prong of the innocent owner defense to a forfeiture action.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Northern District of Oklahoma were:

United States of America, Plaintiff-Appellee;

16328 South 43rd East Avenue, Bixby, Tulsa County, Oklahoma, sued as: one parcel of real property known as: 16328 South 43rd East Avenue, Bixby, Tulsa County, Oklahoma, and all buildings, appurtenances, and improvements thereon, Defendant;

Ozella Scott, Claimant-Appellant.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ozella Scott respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 10, 2002, in order to resolve the conflict between the Tenth and Second Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this Petition is reported at 275 F.3d 1281 (10th Cir. 2002), and is set forth in the Appendix to this Petition at A1-A18. The Judgment of Forfeiture of the United States District Court for the Northern District of Oklahoma, filed on April 18, 2000, is unreported and is set forth in the Appendix at A19-A24. The Order of the United States District Court for the Northern District of Oklahoma, filed on April 10, 2000, is unpublished and set forth in the Appendix at A25-A30.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered an opinion in this case on January 10, 2002. No petition or suggestion for rehearing was submitted to the Court of Appeals. This Petition for Writ of Certiorari is taken from the January 10, 2002, decision of

the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

21 U.S.C. § 881(a)(7), as in effect at the time of the Trial Court's decision, provides in pertinent part:

> § 881. Forfeitures
>
> (a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtences or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

This case involves a forfeiture action against the property of an elderly widow whose husband was shot down over North Vietnam and whose son was convicted of various federal charges involving marijuana. The

United States of America (hereinafter referred to as the Government) filed suit against certain property in the Court below (hereinafter referred to as the defendant property) on August 19, 1996, as amended on March 7, 1997, seeking a judgment of forfeiture against the Defendant property pursuant to Title 21, United States Code, Section 881(a)(7). Petitioner Ozella Scott (the Claimant below, but hereinafter referred to as Petitioner) filed an Answer and Claim asserting, *inter alia*, innocent ownership of the Defendant property on October 28, 1996.

Petitioner's son, Mark Allen Scott, had been accused in a four count superseding Indictment, filed on October 7, 1995, of manufacturing marijuana; maintaining a place for the purpose of manufacturing, distributing, and using marijuana; possessing marijuana with intent to distribute; and knowingly using and carrying a firearm while being in possession of marijuana with intent to distribute and manufacture marijuana, all in violation of Title 21, United States Code, §§ 841(A)(1), 856(A)(1), 841(A)(1), and Title 18, United States Code, § 924(3), respectively. All the aforesaid offenses were alleged to have been committed on August 28, 1995.

In answering questions from the Criminal Trial Court, Mark Allen Scott made no mention of Petitioner's knowledge of or consent to any of Mark Allen Scott's illegal drug activities. According to Mr. Scott, he had only grown about seven marijuana plants, with only two of said plants still in the ground at the time of his arrest on August 28, 1995. Further, the marijuana plant which his mother (Petitioner) found growing in a toilet—and which she killed—was the result of a marijuana seed being

accidently dumped in the toilet and later found by Petitioner in the late 1980s, at least six years prior to Mark Allen Scott's arrest.

Mark Allen Scott's only previous arrests on drug charges were misdemeanor marijuana possession cases in 1978 and 1979 (both of which were dismissed)—more than sixteen years before his arrest on the federal drug charges with which we are concerned with in the case at bar. Mr. Scott made it very clear that his mother (Petitioner) had told him not to grow marijuana on the Defendant property and had stated that if she ever caught him growing marijuana on the property again she would kick him off of it. Mr. Scott also let the grass grow up in the back and never mowed it so as to discourage Petitioner from going around the back because of the insects and ticks. Therefore, Petitioner would only walk around the pond area and around the shop.

As to Petitioner, she admitted that in the late 1980s she had found what she thought was a growing marijuana plant in an old toilet on the Defendant property. She killed the marijuana plant by spraying it with weed killer, and told her son that she never wanted to find any more marijuana out there. At another prior time, Petitioner let her nephew and his wife and daughter move onto the Defendant property. One of her rules was that there would be no marijuana or drugs of any kind. Petitioner later noticed a marijuana plant through a window and she told her nephew that he was to get the marijuana out of there and to move—which her nephew did.

While Petitioner had mowed the Defendant property up until the early 1990s—almost five years before her

son's arrest, she stopped mowing the Defendant property and only went to visit the shop and building thereon about two or three times a year after the early 1990s. The only other times that Petitioner had seen any marijuana related activity was sometime several years before her son's arrest when she noticed some marijuana seeds—which she threw away, and one time in the later 1980s when she found a marijuana cigarette in the kitchen of the trailer—which actually belonged to a friend of her son. Petitioner stated specifically that she had never seen any marijuana grow light, bongs, or any other marijuana smoking devices, scales, or pots with marijuana growing in them. While Petitioner did admit that her son's former wife, Laura Moody—while drunk, throwing objects, and fighting with Mr. Scott—had said something to her about her son growing marijuana several years before his arrest, Petitioner noted that she was mainly concerned about the safety of her granddaughter at the time. Therefore, Petitioner removed her granddaughter from the hostile situation and talked to her son later. However, she stated that she had never seen marijuana plants growing on the property.

The Government filed a Motion for Summary Judgment on October 22, 1999, supported by a Memorandum of Law and exhibits setting forth a statement of material facts as to which no genuine issue exists. Subsequently, an Affidavit of Tom Huckeby in support of the Government's Motion for Summary Judgment was filed on October 25, 1999. Petitioner filed her response to the Motion for Summary Judgment along with a supporting Memorandum of Law on November 9, 1999.

On April 10, 2000, the Trial Court issued an Order granting the Government's Motion for Summary Judgment. The Trial Court issued a Judgment of Forfeiture, which was filed on April 18, 2000, and entered on the Court's docket on April 19, 2000.

The Petitioner appealed from the aforesaid Order and Judgment of Forfeiture of the United States District Court for the Northern District of Oklahoma in which the Trial Court granted the Government's Motion for Summary Judgment against the Petitioner and ordered the Defendant property forfeited. The Petitioner filed her Notice of Appeal on June 8, 2000. On January 10, 2002, in a two to one decision, the Tenth Circuit affirmed the holding of the United States District Court for the Northern District of Oklahoma, holding that the Petitioner was not entitled to a jury trial on the question of whether or not she had consented to the drug activity on her property. However, the dissenting opinion noted that the majority's decision was in conflict with a decision of the United States Court of Appeals in the case of *United States v. One Parcel of Property located at 121 Allen Place, Hartford, Connecticut*, 75 F.3d 118 (2nd Cir. 1996) and possibly with an earlier decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Lot Numbered One (1) of the Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001).

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's decision that Petitioner is not entitled to a jury trial on the question of whether her actions were reasonable under the particular circumstances concerning the consent prong of the innocent owner defense is in conflict with a ruling of the Second Circuit.

The United States Court of Appeals for the Tenth Circuit's previous decision in *Lavaland Annex* held that:

> [T]he court's own sense of what would have been reasonable provides an insufficient basis to reject the innocent owner defense. The question of whether the measures taken by the property owner to prevent illegal drug trafficking were reasonable under the circumstances is a factual one resolved by evaluating the evidence and arguments in the record—not by speculating about what could have been done. *United States v. Lot numbered One (1) of the Lavaland Annex*, 256 F.3d 949, at 955 (10th Cir. 2001).

Whether or not the complained of instant decision by the Tenth Circuit is in conflict with its previous decision in *Lavaland*, there is a definite conflict with the Second Circuit's decision in *United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut, supra*, where the Second Circuit held that a seizure and forfeiture of property under § 881(a)(7) wherein the claimant asserts the innocent owner defense is a question for a jury to decide as to the reasonableness of the actions taken by the claimant.

The Second Circuit held that it is not for the trial court to put its judgment in place of the jury's decision. As the Second Circuit stated: "the evidence of those

efforts, and the reasonableness, is for the trier of fact to determine in considering whether the owner proved a lack of consent to the narcotics activity." *United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut, supra,* at 123. Because the instant case had ample evidence of actions taken by the Petitioner which showed her disapproval and lack of consent of her son's scattered and minor drug activities, it was not for the Trial Court or the Court of Appeals to deny her the right to jury trial on the question of whether her actions were reasonable.

CONCLUSION

It is appropriate for the Court to exercise its discretion to grant certiorari in this case. The Tenth Circuit's opinion on the subject of reasonableness and its denial of a jury trial on that question to Petitioner is in conflict with an opinion of the United States Court of Appeals for the Second Circuit. Additionally, the decision of the Tenth Circuit in question herein seems to be somewhat inconsistent with one of its own prior decisions—which seems more in line with the conflicting decision of the Second Circuit Court of Appeals. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. 16328 SOUTH 43RD EAST AVENUE, BIXBY, TULSA COUNTY, OKLAHOMA, sued as: one parcel of real property known as: 16328 South 43rd Avenue, Bixby, Tulsa County, Oklahoma, and all buildings, appurtenances, and improvements thereon, Defendant. --- OZELLA SCOTT, Claimant-Appellant,	)	No. 00-5117

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D. Ct. No. 96-CV-758-E)

(Filed Jan. 10, 2002)

James C. Linger, Butler & Linger, Tulsa, Oklahoma, appearing for Appellant.

Catherine J. Depew, Assistant United States Attorney (Thomas Scott Woodward, United States Attorney, with her on the brief), Office of the United States Attorney, Tulsa, OK, appearing for Appellee.

Before **TACHA**, Chief Judge, **GARTH***, and **EBEL**, Circuit Judges.

TACHA, Chief Circuit Judge.

Ozella Scott appeals the forfeiture of her property under 21 U.S.C. § 881(a)(7). Ms. Scott argues that the district court erred in interpreting and applying the innocent owner defense under § 881(a)(7). We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. Background

Police conducted a raid on appellant Ozella Scott's real property on August 28, 1995. During the course of this raid, police caught Ms. Scott's son, Mark Scott, with five marijuana plants that he had pulled from the ground as he fled. They also found two plants still growing on the property. Police executed a search warrant and found 1.4 pounds of marijuana in a mobile home on the property, along with various firearms. Police also found two "portable outbuildings" containing lights, insulation, and

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* The Honorable Leonard I. Garth, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

a total of 37 pots. Some of the pots contained remnants of marijuana plants. Mark Scott pleaded guilty to various drug-related offenses stemming from this raid. On August 19, 1996, the United States began forfeiture proceedings against the property used by Mark Scott to grow and store the marijuana.

In an affidavit dated February 19, 1997, Ms. Scott wrote the following:

> My name is Ozella Eunice Scott. I was borned [sic] 8-22-33 Present age 63. I live at 5905 N. Lewis, Tulsa, OK. Today I voluntarily came to F.B.I. office in tulsa [sic] to take a polygraph test after taking the test I was told I had problems with question, before Mark's arrest did I know he was growing marijuana on property in Bixby.
>
> I did know he grew one plant in old toilet by shop the plant was 12" to 15" high, this was before his arrest at least two years. I sprayed it with weed killer & killed it. About week later he told me it was his. I let him know how angry I was. About a year before arrest I found seeds I believe were marijuana, wife & daughter were there, I said I hope you two aren't smoking in front of daughter. I was very angry with them.
>
> I know Mark smoked marijuana, I didn't know how much, since arrest I heard he smoked quite a lot. His lawyer told me, he said Mark told him.
>
> I found roach (marijuana cig.) in trailer in kitchen in last [sic] 80, ask Mark if it was his, his friend Pete said it was his. Also in late 80 my nephew Rusty Chenault had a trailer parked on property with Mark, one day when I was there I

> saw one marijuana plant through [sic] back window of Rusty trailer, I didn't say anything to them this time. Had told both of them not to grow marijuana on my property. I had been told they had grown marijuana other places.
>
> Before Mark got divorce from Laura, they would get in fights & she would tell me Mark was growing marijuana on my property & smoking it. I never saw it & I never went looking for it.

Ms. Scott stated in her deposition that Laura Scott only made one statement regarding marijuana growth on the property, and that Laura Scott was inebriated and had been fighting with Mark Scott at the time of her statement. In response to her daughter-in-law's report that Mark Scott was growing drugs on the property, Ms. Scott drove around the property looking for drugs. She apparently did not investigate any of the buildings or the back of the property. She then informed her son that she hoped he was not growing drugs on the property "because you know how I feel about it. I don't want it on my property and I don't even want you using it." Ms. Scott further stated that she rarely visited the property and never went there during the summer. She did not receive any mail at the property.

Mark Scott testified in a deposition that his mother bought the property with the survival benefits paid out after his father was classified Missing in Action in Vietnam. Mark Scott further testified that he had lived on the property since 1981, had taken care of it for his mother, and had purchased half of the trailer on the property with some of his share of the survival benefits. He stated that

he had purposely allowed the grass in the backyard to grow high so that Ms. Scott would not venture into the back yard. It also appears from the record that barbed wire was erected to prevent Ms. Scott from venturing into the back yard. When asked what steps his mother had taken to prevent him from growing marijuana on her property, Mark Scott replied "Told me not to be growing it . . . If I ever catch you doing it or anything else, I'm going to kick you off of here. The only reason she's letting me stay there now is because of the kids."

Mark Scott stipulated to forfeiture of his interest in the property. Ms. Scott conceded that probable cause existed for forfeiture. However, Ms. Scott claimed that she was an innocent owner and was therefore entitled to retain the property. On April 5, 2000, the District Court for the Northern District of Oklahoma granted the United States' motion for summary judgment, finding no facts that could lead a reasonable jury to believe that Ms. Scott was an innocent owner. On April 18, 2000, the district court entered a judgment of forfeiture. Ms. Scott appealed, and we now affirm.

II. Discussion

We review de novo the district court's grant of summary judgment. *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(c). When we apply this standard, we examine the record and any reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1071 (10th Cir. 1998).

Title 21 of the United States Code authorizes forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). However, the statute provides for an affirmative defense, which has come to be known as the "innocent owner defense." Ms. Scott concedes that the property was used in violation of federal drug laws. The only question on appeal is whether Ms. Scott presented sufficient evidence of innocent ownership to survive summary judgment.

At the time that these proceedings commenced, the statute required an owner who invoked the affirmative defense to prove by a preponderance of the evidence that the illegal acts were committed "without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7)[1]; *United States v. 9844 S. Titan Court, Unit 9*, 75 F.3d 1470, 1477

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[1] This language has since been repealed. Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, § 2(c)(2), 114 Stat. 202 (2000) (codified for relevant purposes at 18 U.S.C. § 983) (striking the exception clause). The innocent owner defense now applies to those who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A).

(10th Cir. 1996), *overruled on other grounds, United States v. Ursery*, 518 U.S. 267 (1996). The circuits are split as to whether the statute requires an innocent owner to prove *both* a lack of knowledge and a lack of consent, or *either* a lack of knowledge or a lack of consent. *Compare United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 995 F.2d 1558, 1561 (11th Cir. 1993) (adopting the conjunctive approach), *with United States v. 141st St. Corp.*, 911 F.2d 870, 877-78 (2d Cir. 1990) (adopting the disjunctive approach). Both parties urge us to address this question. Ms. Scott argues that the statute is to be read disjunctively, requiring an innocent owner to prove a lack of either knowledge or consent. The United States disagrees, arguing that the statute should be read conjunctively. However, because we hold that Ms. Scott both knew of and consented to the drug activity on her property, we need not address the disjunctive/conjunctive debate.

A. Knowledge

Because the innocent owner defense is an affirmative defense, it is not incumbent upon the government to prove that the owner had knowledge of the illegal activity. Rather, "it is the claimant's responsibility to prove the *absence* of actual knowledge." *United States v. Four Million, Two Hundred Fifty-Five Thousand, Six Hundred & Twenty-five Dollards & Thirty-Nine Cents*, 762 F.2d 895, 907 (11th Cir. 1985). Moreover, we are not constrained to accept denials supported by a mere scintilla of evidence. Such bare denials – for example, where the defendant's alleged ignorance amounts to willful blindness, or where the owner's claims of ignorance are "inconsistent with the

uncontested facts" – are insufficient to create a genuine triable issue. *United States v. One Parcel of Prop., Located at 755 Forest Rd.*, 985 F.2d 70, 72-73 (2d Cir. 1993); *see also United States v. Parcel of Land & Residence at 5 Bell Rock Rd.*, 896 F.2d 605, 611 (1st Cir. 1990) (a "merely colorable" affidavit is insufficient as a matter of law to avoid summary judgment).

Here, the record establishes that no issue of material fact exists as to whether Ms. Scott knew of drug activity occurring on her property. Her testimony shows that she had found marijuana growing in a toilet on her property, that she had found seeds that she believed were marijuana, that she was aware her son smoked marijuana, that she had been told that he grew marijuana in other places, and that she had been told by her son's estranged wife that he was growing marijuana on the property. Admittedly, Ms. Scott killed the marijuana plant in the toilet, associated the seeds with smoking rather than growing marijuana, stated that she did not believe that her son knew how to grow marijuana, "never saw [marijuana]," and inspected the property after being told that her son was growing marijuana. However, she admitted that her search was limited, stating that "[p]hysically I was not able to go out and basically search everything." Ms. Scott never sought help searching the property despite being told that her son was growing marijuana. These facts establish that Ms. Scott was at best willfully blind to her son's activities. Thus, even indulging all inferences in Ms. Scott's favor, there is no issue of triable fact as to whether Ms. Scott knew of the illegal activity on her property. The district court was correct in determining that, as a matter

of law, Ms. Scott could not establish that she did not know of her son's illegal activities.

B. Consent

In *United States v. Lot Numbered One (1) of the Lavaland Annex*, this court applied a broad definition of consent, under which an owner consents to drug use on her property if she fails " 'to take all reasonable steps to prevent illicit use of [the] premises once [she] acquires knowledge of that use.' " 256 F.3d 949, 953-54 (10th Cir. 2001) (quoting *141st St.*, 911 F.2d at 879). Although we applied this broad definition in *Lavaland* without explicitly adopting it as the standard of this circuit, we do so now. In determining what would constitute "reasonable steps" under particular circumstances, we have held that a modified objective standard should be utilized. *Id.* at 955. While we rejected a purely subjective test, we acknowledged that a property owner "should not be required to take 'heroic or vigilante measures to rid his or her property of narcotics activity.' " *Id.* (quoting *United States v. All Right, Title & Interest in Prop. & Premises Known as 710 Main St.*, 753 F. Supp. 121, 125 (S.D.N.Y. 1990)). Thus, we set out an objective test with a limited subjective component: "[T]he question is what measures were reasonable under the particular circumstances confronted by the property owner in question. Those circumstances may include the property owner's reasonable fears and concerns, its degree of familiarity with crime prevention, and its economic resources." *Lavaland*, 256 F.3d at 955 (citing *710 Main St.*, 753 F. Supp. at 125) (internal citations and quotation marks omitted).

While we reversed and remanded for trial in *Lava-land*, we did so because the record there did not contain facts regarding the reasonableness of potential actions by the property owner. Also, the district court had heard no argument regarding potential reasonable measures. We are confronted with very different circumstances here. The record clearly shows that Ms. Scott did little to deter her son from growing drugs on her land. She killed one of the marijuana plants with weed killer, confiscated and disposed of the marijuana seeds she had found, and threatened her son with eventual eviction if he did not desist. However, these steps fall short of what any reasonable land owner would undertake given such knowledge of drug use and cultivation. For example, she could have given notice to appropriate law enforcement officials, and she could have evicted her son upon the information she received from her daughter-in-law. At the very least, Ms. Scott could have investigated the property more thoroughly to determine whether marijuana was in fact growing there. While we understand that Ms. Scott might have had difficulty investigating the property on her own, nothing prevented her from having some third party – such as the police – investigate the property for her. Instead she largely ignored obvious signs that her property was being used to grow marijuana plants.[2]

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[2] We do not hold that these options are an exhaustive list of things that a landowner in Ms. Scott's shoes must do to act reasonably. There may well be other alternatives we have not considered that might warrant empaneling a jury. Nor do we hold that a claimant-owner who takes such steps is automatically entitled to have a jury empaneled. The list of options is simply intended to illustrate that there were at least

The fact that the occupant was Ms. Scott's son does not relieve her of her duties as a landowner to take all reasonable steps to keep her property free of illegal activities. Such a bond certainly does not automatically entitle her to a jury trial on the question of the reasonableness of her actions. Denying the innocent owner defense to a landowner who failed to investigate thoroughly claims that her son grew drugs on the property, evict her son upon confirmation of those claims, or report such activities to police would be less harsh than what other courts have required of landowners. *See, e.g., United States v. Two Parcels of Prop. Located at 19 & 25 Castle St.*, 31 F.3d 35, 40 (2d Cir. 1994) (holding that parents who feared drug lord retaliation, notified police, and pressed their children to enter rehabilitation consented as a matter of law to their children's drug activity because they did not search the premises for drugs and did not evict their children); *United States v. Sixty Acres in Etowah County*, 930 F.2d 857, 860-61 (11th Cir. 1991) (holding that a woman did not escape the consequences of consent to husband's illegal acts even though she presented evidence that her husband had beaten his previous wife to death, had beaten her, and owned several guns).

Congress has placed strict duties upon landowners to rid their property of drug activity. Ms. Scott's decision not to investigate the property thoroughly when all signs indicated that it was being used to grow marijuana, her decision not to alert the police, her decision not to evict her son upon continued evidence of his illegal activities,

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some reasonable options Ms. Scott could have chosen to maintain a drug-free property.

and her failure to take any comparable steps make it impossible for her to show by a preponderance of the evidence that she took all reasonable steps to prevent the illegal activities from occurring. Thus, we hold that Ms. Scott cannot show lack of consent.

III. -Conclusion

The facts on the record are insufficient as a matter of law to prove that Ms. Scott did not know of or consent to the use of her property for the cultivation of marijuana. Thus, the district court was correct in refusing to try the innocent owner defense to a jury. The judgment of the district court is therefore AFFIRMED.

Garth, J., dissenting:

I part company with my colleagues in the majority respecting only one aspect of Chief Judge Tacha's exemplary opinion. In my view, under the consent prong of the innocent owner defense, the issue of whether Ozella Scott's actions were "reasonable under the particular circumstances," *see* maj. op. at *9, is a question for the jury and not the Court. I adhere to the principle that it is the jury which is the better arbiter of what is reasonable or unreasonable here, given the nature of this mother-son relationship, Ozella Scott's infrequent visits to the property at issue, and the length of time between her son's

drug-related incidents known to Ozella Scott. Consequently, I would reverse the District Court's judgment and remand for trial on the sole issue of consent.

I.

I do not recite the facts again here, except to reiterate that in each of the instances where Ozella Scott was made aware of marijuana growing on her property, she made *some* effort to prevent the illegal activity. For example, with regard to finding marijuana in the old toilet (which, according to Ozella Scott's February 19, 1997 affidavit, was more than two years prior to her son's arrest in 1995), there is no dispute that she immediately killed the plant by spraying it with weed killer and then threatened to evict her son if he ever grew it again. When Ozella Scott found what she thought could be marijuana seeds (about one year prior to Mark Scott's arrest), she again repeated her warning to both her son and his wife. After catching her nephew growing a marijuana plant in the late 1980s, Ozella Scott made him get rid of the plant and then evicted him from her property.

I would also note that when Ozella Scott reprimanded her son, he, Mark Scott, promised her that he would discontinue his drug activity. Though his promises were unfulfilled and turned out to be lies, Mark Scott adopted measures to discourage and prevent Ozella Scott from inspecting the property in the back yard where the marijuana was growing. Knowing his mother did not like insects and ticks, evidence in the record demonstrates that Mark Scott purposefully did not cut the grass so that it grew high, knowing this would keep his mother from

investigating. Indeed, the record indicates that Mark Scott erected barbed wire to prevent his mother from checking in the back yard. *See* maj. op. at *4. Further, there is no dispute that Ozella Scott did not live on the property, that she visited the property maybe three times a year, and that she consistently communicated her disapproval of any drug use – let alone drug distribution and cultivation – on her property to her son. There is no evidence in the record to suggest that Ozella Scott was aware of the true extent of her son's extensive drug activities.

II.

I agree with the majority's conclusion that the record conclusively establishes that no issue of material fact exists as to whether Ozella Scott *knew* of some drug activity occurring on her property. *See* maj. op. at *7. The sole remaining issue, therefore, is whether Ozella Scott *consented* to the activity.[1] In defining "consent," the

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[1] Consequently, I would hold – unlike the majority, which by its decision has no need to resolve the issue, *see* maj. op. at *6-7 – that the innocent owner defense under 21 U.S.C. § 881(a)(7), as it existed at the time these proceedings began, requires only a lack of knowledge *or* a lack of consent to be established by the property owner (the disjunctive approach). While the majority very correctly notes that the circuits are split on this issue, *see* maj. op. at *6, an examination of the language of § 881(a)(7) demonstrates to me that the lack-of-knowledge and lack- of-consent requirements should be read disjunctively, as they are connected by an "or" and not an "and." *See* 21 U.S.C. § 881(a)(7) ("no property shall be forfeited . . . by reason of any [illegal] act . . . established by that owner to have been committed . . . without the knowledge *or* consent of that

majority has adopted the "broad" approach applied in *United States v. Lot Numbered One (1) of the Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001), which I agree is the proper definition that should be used. Accordingly, the question that must be asked here is: whether those remedial actions taken by Ozella Scott (described in Section I, *supra*) in response to her son's activities were "reasonable under the particular circumstances confronted by [Ozella Scott]." *Id.* at 955; *see* maj. op. at *9. My answer to that question is: a jury must decide.

III.

While Ozella Scott's actions in hindsight may not have been the best response or the most effective response, and while there may have been other, more dramatic, actions which Ozella Scott could have taken, whether her actions were "reasonable under the particular circumstances" so as to demonstrate consent to her son's illegal activities is – in my view and in light of the limited guidance set forth by this Court in *Lavaland* – a question best answered by the jury, the finder of fact.

In *Lavaland*, the government brought forfeiture proceedings under § 881(a)(7) against a hotel in which drug trafficking had been on-going. The owners of the hotel

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owner.") (emphasis added); *see also United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 623-27 (3d Cir. 1989) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330-339 (1979) ("canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise.")).

claimed to be innocent owners, despite having been previously informed of illegal drug activities there by law enforcement and despite the existence of obvious drug activity. Pursuant to its Findings of Fact and Conclusions of Law, the district court ruled that the owners were not innocent because they could have taken – but did not – several reasonable steps to prevent the illegal use of the property.

On appeal, this Court reversed the district court and remanded for a new trial. In so holding, we noted:

> [T]he court's own sense of what would have been reasonable provides an insufficient basis to reject the innocent owner defense. The question of whether the measures taken by the property owner to prevent illegal drug trafficking were reasonable under the circumstances is a factual one to be resolved by evaluating the evidence and arguments in the record – not by speculating about what could have been done.

Lavaland, 256 F.3d at 955. Although *Lavaland* presented a different set of factual circumstances and a different procedural posture than what is presented here, *see* maj. op. at *9, I believe that the *Lavaland* ruling is consonant with the principle I advance here – namely, that a jury should be the body determining "reasonableness" as to Ozella Scott's remedial actions.

A decision to leave this question for the jury is further supported by the Second Circuit decision in *United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut*, 75 F.3d 118 (2d Cir. 1996). That case involved the seizure of a building owned by Stanley Tucker, who rented apartments to residential tenants.

Over a span of two and half years, police responded to over 360 calls to the building relating to illegal activities, and confidential informants made no less than three controlled purchases of cocaine on the property. At least sixteen people had been arrested in Tucker's building, and the local police department sent a letter to Tucker informing him of at least two of the arrests made on his property. Tucker claimed that he was an "innocent owner" under § 881.

On summary judgment, the district court ruled that there was no issue of fact as to whether Tucker "knew" of the illegal narcotics activity, but it did find material issues as to whether Tucker "consented" to it. After a trial on the "consent" issue, the jury returned a verdict in Tucker's favor. However, the presiding Magistrate Judge – finding that Tucker "took virtually no reasonable steps at all" to prevent the illegal activity – granted the government's Rule 50 motion, and ordered forfeiture of Tucker's property.

In reversing the Magistrate Judge's ruling, the Second Circuit, applying essentially the same "reasonableness" standard which the majority has applied here, held that the determination of the "reasonableness" of the property owner's action was within in the domain of the jury rather than the court. While the case was decided in the context of a Rule 50 motion, the principles articulated therein apply equally well in a summary judgment context. I refer to the Second Circuit's admonition that:

> Although a court might disagree with the jury's conclusions, it cannot substitute its view of the evidence for that of the jury when there is evidence of substantial efforts by an owner of

> property to prevent its use for drug trafficking. *The existence of those efforts, and their reasonableness,* is for the trier of fact to determine in considering whether the owner proved a lack of consent to the narcotics activity. We therefore reverse.

121 Allen Place, 75 F.3d at 122-23 (emphasis added).

I concede that it is a close call as to whether Ozella Scott's efforts were sufficiently "substantial" to warrant a continuation of these proceedings below. However, given the facts particular to her situation, all of which must be viewed in her favor – including her age, her infrequent visits, her relationship with her son, the small number of illegal incidents actually known to Ozella Scott, the length of time that lapsed between learning of each of her son's drug-related incidents, her son's attempts to prevent Ozella Scott from investigating the property, and her son's lies promising that he had ceased all drug activities – the District Court's ruling that Ozella Scott's actions (*e.g.*, killing the marijuana plant, reprimanding and threatening her son, demanding assurances that her son cease drug activities, and evicting her nephew) were not sufficiently "reasonable" to demonstrate her lack of consent to Mark Scott's drug activities is, for the reasons I expressed above, inappropriate and, I believe, in error. Such a determination is one better suited for the jury.

For the foregoing reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 96-CV-758-E
ONE PARCEL OF REAL PROPERTY KNOWN AS: 16328 SOUTH 43rd EAST AVENUE, BIXBY, TULSA COUNTY, OKLAHOMA AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,	)	
Defendant.	)	

JUDGMENT OF FORFEITURE

(Filed Apr. 18, 2000)

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the defendant properties and all entities and/or persons interested in the defendant properties, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 19th day of August, 1996, alleging that the defendant real property was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because it was used, or intended to be used, to commit, or to facilitate

the commission of, a violation of the drug prevention an[d] control laws of the United States.

Warrant of Arrest and Notice *In Rem* was issued on the 16th day of September 1996, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and for publication in the Northern District of Oklahoma.

An Amended Complaint for Forfeiture *In Rem* was filed in this action on the 7th day of March 1997, alleging that the defendant real property, buildings, appurtenances and improvements are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because they were used, or intended to be used, to commit, or to facilitate the commission of, a violation of the drug prevention an[d] control laws of the United States.

Amended Warrant of Arrest and Notice *In Rem* was issued on the 12th day of March 1997, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant properties and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Amended Complaint for Forfeiture *In Rem* and the Amended Warrant of Arrest and Notice *In Rem* on the defendant properties on May 13, 1997.

Mark Alan Scott, Amy Black, Ozella Scott and Dennis Semler, Tulsa County Treasurer were determined to be the only individuals with possible standing to file a claim

to the defendant properties, and, therefore the only individuals to be served with process in this action. United States Marshals Forms reflecting personal service on the potential claimants are on file herein.

All persons and/or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Amended Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant properties, and no persons or entities have plead or otherwise defended in this suit as to said defendant properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant properties and all persons and/or entities interested therein, save and except Mark Allen Scott, who filed his Stipulation for Forfeiture herein on May 16, 1997; Dennis Semler, Tulsa County Treasurer, who filed his Answer herein on December 26, 1996; and Ozella Scott, whose interest in the defendant properties was ordered forfeited by the April 5, 2000, Order of the Court.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the *Tulsa Daily Commerce and Legal News*, a newspaper of general circulation in the district in which this action is pending and in which the defendant

properties are located, on April 17 and 24, and May 1, 1997. Proof of Publication was filed May 20, 1997.

Mark Allen Scott executed and filed his Stipulation for Forfeiture herein on May 16, 1997, wherein he consented to the forfeiture of his right, title and interest to the above described defendant properties. Mark Alan Scott further stipulated that the above described defendant properties are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7) because they were used, or were intended to be used, to commit or to facilitate the commission of, a violation of drug prevention an[d] control laws of the United States.

On December 26, 1996, Dennis Semler, Tulsa County Treasurer filed his answer herein. The Government acknowledged the claim of Dennis Semler, Tulsa County Treasurer, and stipulated to the payment of any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture.

The Court entered an Order on April 5, 2000, granting the Government's Motion for Summary judgment as to the interest of Ozella Scott.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant properties:

A. **SURFACE RIGHTS ONLY IN AND TO:**

The South 211 feet of the North 422 feet of the East 560 feet of the West Half of the Southwest Quarter of the Northeast Quarter (W/2 SW/4 NE/4) of Section 28, Township 17 North, Range 13 East of the Indian

Base and Meridian, Tulsa County, State of Oklahoma, according to the U. S. Government Survey thereof, a/k/a/ 16328 South 43rd East Avenue, Bixby, Oklahoma 74008;

B. 1971 12 x 60 Hillcrest Mobile Home located on the real property described at "A" above;

C. One 8 x 16 Roadrunner storage building; one 8 x 20 Roadrunner storage building located on the real property described at "A" above;

be, and they hereby are, forfeited tot he United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant properties as follows:

1) First, from the sale of the defendant properties, payment to the United States of America of all expenses of forfeiture of the defendant properties, including, but not limited to expenses of seizure, custody, advertising, and sale;

2) Second, from the sale of the defendant real property, any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture;

3) The remaining proceeds from the sale of the defendant properties shall be deposited in the asset forfeiture fund according to law.

Entered this 18th day of April, 2000.

/s/ James O. Ellison
JAMES O. ELLISON
Senior Judge of the United
States District Court for
the Northern District of Oklahoma

SUBMITTED BY:

/s/ Catherine J. Depew
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(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	Case No. 96-C-758-E
vs.	)	
ONE PARCEL OR REAL PROPERTY KNOWN AS: 16328 SOUTH 43RD WEST AVENUE, BIXBY, TULSA COUNTY, OKLAHOMA AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, Defendant.	)	

ORDER

(Filed Apr. 10, 2000)

Now before the Court is the Motion For Summary Judgment (Docket #33) of the Plaintiff, United States of America.

The United States contends that the above-described property is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7) because it was used or intended to be used to commit or to facilitate the commission of a violation of the drug prevention and control laws of the United States. Claimant, Ozella Scott, owns the land and half interest in the mobile home on the land. Her son, Mark Alan Scott, who resided on the property, has stipulated to

forfeiture of his interest in the property and the improvements thereon. Moreover, Mark Alan Scott has admitted that he grew marijuana on the property with the intent to distribute the marijuana to other persons. The sole issue in this motion for summary judgment is whether Ozella Scott is an "innocent owner" for the purposes of this forfeiture proceeding.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts . . . " Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate

their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel,* 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in *Committee for the First Amendment v. Campbell,* 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Id. at 1521.

Forfeiture is authorized, pursuant to 21 U.S.C. § 881(a)(7) for property described as follows:

> All real property, including any right, title, and interest (including any leasehold interest) in the

> whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission or, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Ozella Scott has conceded that probable cause existed for forfeiture, and in fact, it is undisputed that the property at issue was connected to a violation of the narcotics laws. The only defense advanced by Ozella Scott is that of "innocent owner." The innocent ownership defense requires a showing that (1) claimant was not involved in the wrongful activity; (2) the claimant was not aware of the wrongful activity; and (3) the claimant had done all that reasonably could be expected to prevent the proscribed use of the property. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). The government argues that since Ozella Scott continued to allow Mark Alan Scott to occupy the property despite her knowledge that marijuana had been grown there, and because she failed to take any steps to prevent the illegal use, the innocent ownership defense is not available to her. Mrs. Scott argues that her telling Mark Scott that she "didn't appreciate," him growing marijuana on the property, that she "did not want to find anymore out there," and that she didn't want m[ar]ijuana on her property and didn't want him using it are sufficient to raise a question of fact

as to whether she "had done all that reasonably could be expected to prevent the proscribed use of the property."

Ozella Scott made the following statement in conjunction with the investigation of her son:

> My name is Ozella Eunice Scott. I was born 8-22-33. Present age 63. I live at 5905 N. Lewis, Tulsa, Ok. Today I voluntarily came to F.B.I. office in tulsa (sic) to take a polygraph test after taking the test I was told I had problems with the question, before Mark's arrest did I know he was growing marijuana on property in Bixby.
>
> I did know he grew one plant in old toilet by shop the plant was 12" to 15" high, this was before his arrest at least 2 years. I sprayed it with weed killer and killed it. About a week later he told me it was his. I let him know how angry I was. About a year before arrest I found seeds I believe were marijuana, wife and daughter were there, I said I hope you two aren't smoking in front of daughter, I was very angry with them. I know Mark smoked marijuana, I didn't know how much, since arrest I heard he smoked quite a lot. His lawyer told me, he said Mark told him.
>
> I found roach (marijuana cig.) In trailer in kitchen in last (sic) 80, ask Mark if it was his, his friend Pete said it was his. Also in late 80 my nephew Rusty Chanault has a trailer parked on property with Mark, one day when I was there I saw one marijuana plant through back window of Rusty trailer, I didn't say anything to them this time. Had told both of them not to grow marijuana on my property. I had been told they had grown marijuana other places.

> Before Mark got divorce from Laura, they would get in fights and she would tell me Mark was growing marijuana on my property and smoking it. I never saw it and I never went looking for it.

Therefore, by Ms. Scott's own testimony, all she did to prevent the illegal use of the property was to tell her son not to grow it on her property, but she was aware of marijuana on her property after she told him not to grow it there. Moreover, she specifically stated that she "never went looking for" the marijuana, and it is undisputed that she allowed her son to continue living on the property even after finding marijuana there. The Court finds that Mrs. Scott's statements to her son and spraying weedkiller on a plant one time (another time she did not do anything) are insufficient to raise a question of fact as to whether she "had done all that reasonably could be expected to prevent the proscribed use of the property."

The government's Motion For Summary Judgment (docket #33) is granted.

IT IS SO ORDERED THIS 5th DAY OF APRIL, 2000.

/s/ James O. Ellison
JAMES O. ELLISON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT